No. 16505

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON BIEBER and DONALD PAUL MYERS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.
JURISDICTION.

The appellants were indicted with six co-defendants in a nine-count indictment on April 30, 1958. A jury trial of appellants only commenced on September 9, 1958, resulting in a conviction of appellants on Counts One and Two of the indictment on September 18, 1958.

The appellants filed individual notices of appeal from the judgment on both counts on October 24, 1958.

The District Court had jurisdiction under the provisions of 18 U. S. C. Sections 371, 471, 472 and 473, and 18 U. S. C. Section 3231. This court has jurisdiction of the appeal under the provisions of 28 U. S. C. Sections 1291, 1294.

II.
STATUTES INVOLVED.

The indictment charges violations of Title 18, Sections 371, 471, 472, 473, United States Code, which statutes are quoted below:

Title 18, U. S. C., Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, U. S. C., Section 471:

"Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5000 or imprisoned not more than 15 years, or both."

Title 18, U. S. C., Section 472:

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5000 or imprisoned not more than 15 years, or both."

Title 18, U. S. C., Section 473:

> "Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same shall be passed, published, or used as true and genuine, shall be fined not more than $5000 or imprisoned not more than 10 years, or both."

III.

STATEMENT OF PROCEDURAL POINTS.

On April 30, 1958, the Federal Grand Jury in and for the Southern District of California, returned a nine-count Indictment charging appellants, together with Daniel Migdol, James A. Matlock and four others, with counterfeiting government obligations, uttering counterfeit government obligations, transferring counterfeit government obligations and a conspiracy to do the same. The appellants were included in Counts One and Two of the Indictment only.

Count One charged all of the defendants with agreeing, confederating and conspiring to counterfeit obligations of the United States in violation of 18, U. S. C., Section 371, to sell and transfer counterfeit obligations of the United States in violation of 18, U. S. C., Section 473, and to utter counterfeit obligations of the United States in violation of 18, U. S. C., Section 472.

Count Two charged that the appellants and Daniel Migdol falsely made, forged and counterfeited 2,600 $20.00 Federal Reserve notes and 2,600 $10.00 Federal Reserve notes.

The appellants were arraigned, and after the appointment of a psychiatrist to examine Donald Paul Myers,

after submission of the psychiatrist's report, and after the appellants had entered their plea of not guilty, the appellants were tried by a jury in the United States District Court of the Southern District of California, Central Division. The jury, on September 18, 1958, found each of the appellants guilty as charged. The other six defendants had previously pleaded guilty.

On October 14, 1958, the appellants were sentenced to two years' imprisonment on Count One and to five years' imprisonment on Count Two of the Indictment, said sentences to be served concurrently.

On October 24, 1958, appellants Bieber and Myers filed individual notices of appeal from the judgment on both Counts [CT. pp. 88 and 94].* Affidavits in support of motion to prosecute appeal in *forma pauperis* were filed by appellants Bieber and Myers on December 3, 1958 [CT. pp. 90-93] and December 8, 1958 [CT. pp. 96-99] respectively. The affidavits are substantially identical and allege: 1) the insufficiency of the evidence to prove appellants had engaged in the manufacture of counterfeit money; 2) the prosecution improperly allowed a written ex parte statement (*sic*) into evidence over the objection of appellant and although eventually stricken, it had been read and referred to in presence of jury and this was the only proof of the charge in Count Two; 3) improper argument of Assistant United States Attorney in referring to this statement and to the prior inconsistent statement of the particular witness; 4) failure of the court to admonish the jury to disregard the improper remarks of the Assistant United States Attorney; 5) admission into evidence of telephone conversations with-

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*"TR." refers to the Transcript of Record and "CT." refers to Clerk's Transcript.

out proper foundation; 6) admission into evidence of property of appellants taken without a search warrant and not incident to a lawful arrest; and 7) a general objection on many points to the inadequacy of the charge to the jury.

In appellants' brief, at page 3, it is stated that the appeal is taken only as to Count Two, and the appellants have alleged four specifications of error.

The first specification of error (App. Br. p. 22) appears to be in two parts: First, the failure of the District Court to grant a hearing on the Government's allegation of surprise, and second, the asserted prejudicial error of exposing the jury to "exceptionally damaging unsworn evidence." Although not stated specifically in the specification of error, it is assumed appellants are referring to both oral and written extra-judicial statements of the witness, Daniel Migdol.

The remaining three specifications of error are the refusal by the trial judge to give three jury instructions. The objection to two of the instructions was not made until the jury had retired [TR. pp. 968 and 969], and the objection to the proposed Government's instructions is now made for the first time on appeal.

(Since the extra-judicial statements, both oral and written, were referred to a number of times throughout the trial, the following chronological statement of the procedural points of the case is designed to cover all such references, as well as those occasions on which the alleged misconduct of the Assistant United States Attorney was raised.)

In his opening statement, on September 10, 1958, the Assistant United States Attorney referred to an agreement between Milton Bieber and Danny Migdol to coun-

terfeit money [TR. p. 103] as well as a warning system used by the appellants who he stated were present during the printing operation. [TR. p. 104.]

The first witness called to the stand by the Government was Daniel Migdol, a co-defendant who had pleaded guilty to Counts One and Two. [TR. p. 110.] Migdol stated that he had a conversation with appellant Bieber in reference to the production of counterfiet notes. [TR. p. 112.] Migdol initially denied that there were any warning arrangements. [TR. p. 120.] At that point the Assistant United States Attorney requested permission to ask leading questions on the basis that the witness was hostile. The Court granted permission and the defense counsel objected on the ground that it appeared the Government was going to attempt to impeach its own witness. [TR. p. 121.] The objection was overruled.

The prosecution questioned the witness as to oral statements of the previous day made in Los Angeles in the United States Attorney's office to the Assistant United States Attorney. (For purposes of clarification these statements will be referred to as the "Los Angeles Oral Statements" as distinguished from the "Chicago Written Statement" which shall be referred to hereinafter.) The defense counsel requested a running objection to the particular line of questioning, referring to the "Los Angeles Oral Statement." [TR. p. 122.] The Assistant United States Attorney then commenced to ask leading questions referring to the "Los Angeles Oral Statements" in regard to an agreement to counterfeit money between the witness and Milton Bieber. [TR. p. 122.] Defense counsel objected on the basis that the prosecution was getting to the jury as an "ex parte statement" what the prosecution could not get in by direct evidence. [TR. p. 123.] The defense counsel requested a hearing to deter-

mine whether the Assistant United States Attorney was actually and genuinely surprised. The court denied the request. [TR. p. 124.]

In answering the questions asked as to the "Los Angeles Oral Statements" the witness referred for the first time to the "Chicago Written Statement," stating that the Assistant United States Attorney had questioned him the previous day regarding the latter statement. [TR. p. 125.] The prosecutor directed the witness' attention back to the "Los Angeles Oral Statements."

The witness then denied that he had stated that Milton Bieber had entered an agreement with him to counterfeit money. [TR. p. 125.] The prosecutor asked him if he had not discussed a warning system in the "Los Angeles Oral Statement." [TR. p. 131.] The witness then admitted that he had a warning system set up. [TR. p. 132.] The prosecution, once again referring to the "Los Angeles Oral Statement" asked the witness if he had not told him (the prosecutor) that the appellants were present in the front of the shop while he was in the back room printing. [TR. p. 132.] The witness admitted he had stated that the appellants were there when he started printing but not when he finished. [TR. p. 135.] Previously, the witness had testified that the appellants were not present when he printed the money on the night of March 26. [TR. p. 130.] At this point the prosecuting attorney discontinued reference to the prior inconsistent statements.

The next incident which would seem to have some bearing on this problem occurred immediately after the morning recess in the presence of the jury. Defense counsel stated that *he had heard* that the prosecuting attorney had grabbed a witness in the presence of several mem-

bers of the jury and said, "What are you trying to do to me?" He requested the Court to inquire as to the truth of this and stated he would request a mistrial if it had happened. The Assistant United States Attorney categorically denied that such had happened and the court denied the motion for mistrial. [TR. pp. 157, 158.]

Later, during the course of further direct examination of Migdol, the prosecuting attorney inquired about the written statement made in Chicago by this witness to the United States Secret Service men. The defense counsel objected on the basis that it was another attempt by the Government to impeach its own witness. The court overruled the objection. [TR. p. 175.]

The prosecution asked the witness if he had told them the whole truth. [TR. p. 177.] The witness replied by referring to parts of the "Chicago Written Statement," and denied that he had made a portion of it. [TR. p. 177.] At this point the "Chicago Written Statement" was marked for identification as Government's Exhibit 1. [TR. p. 177.] The prosecuting attorney then asserted that he was attempting to impeach his own witness because he was hostile. [TR. p. 178.]

The witness examined the exhibit and stated he had made it in Chicago and identified his signature. [TR. p. 179.] The defense counsel objected to this procedure and asked to have a voir dire examination to determine if the Government was genuinely surprised. The objection was overruled. [TR. p. 181.]

The prosecuting attorney asked the witness to read the third paragraph which the witness did. [TR. p. 182.] Defense counsel, after personally examining it, stated there was nothing in that portion of the "Chicago Written Statement" that contradicted the testimony of the

witness. [TR. p. 183.] The witness read the paragraph to the jury. When the witness had finished the paragraph, the court ruled that the particular paragraph was not impeaching in that the information contained therein was previously brought out in direct testimony. [TR. p. 188.]

In the direct examination of Charles E. Peyton, Special Agent, United States Secret Service, the prosecuting attorney asked the witness if he had taken a statement from Daniel Migdol in Chicago on April 19, 1958. The witness stated he had and identified Government's Exhibit 1 for identification as the statement taken. [TR. p. 560.] The prosecuting attorney offered Exhibit 1 into evidence. [TR. p. 562.] Upon objection of defense counsel, the court stated it would reserve ruling on the admissibility until defense counsel had opportunity to cross-examine the witness. [TR. p. 562.] The defense counsel again asked for a preliminary hearing to determine the issue of surprise out of the presence of the jury. [TR. p. 562.]

The court granted the request and allowed the jury to retire for the weekend. [TR. p. 564.] The court told defense counsel that he might ask any questions he wished of the witness. [TR. p. 565.] Defense counsel declined on the basis that this wasn't the proper witness. The court inquired as to what witness the defense counsel wished to call. [TR. p. 565.] Defense counsel stated that he didn't wish to cross-examine the particular witness on the stand and he then proceeded to argue at length in regard to the proper procedure for establishing surprise and for the laying of a foundation for impeachment. [TR. pp. 565-570.]

At the conclusion of the defense counsel's argument, the court received the exhibit into evidence. This was still

outside the presence of the jury and the court recessed until the following Tuesday morning at 10:00 a.m. [TR. p. 565.]

On Tuesday, September 16, with the jury present, the trial resumed, and Charles E. Peyton, the witness took the stand. After a short examination of the witness, the prosecution, without any further reference to Government Exhibit 1 whatsoever, concluded and rested its case. [TR. p. 579.] Thereupon, defense counsel requested permission to make motions without the presence of the jury. The court invited him to make these motions at side bar and, accordingly, defense counsel made motions for judgment of acquittal. These motions were denied. [TR. p. 579.] At this time defense counsel, still at side bar, made a motion to strike Exhibit 1 as improper and irrelevant evidence. [TR. p. 580.] The Government offered to withdraw the exhibit and mark it for identification only and the court allowed this procedure to be followed. [TR. p. 581.] In argument, the prosecuting attorney characterized the witness, Daniel Migdol, as a "verbal garbage can." [TR. p. 870.] Defense counsel objected, and the court stated that argument of counsel was not evidence and the prosecuting attorney continued with his argument. [TR. p. 871.] In answering a question, the defense counsel had raised in his argument as to why the prosecution did not call Bill Smith, a co-defendant who had pleaded guilty, the prosecuting attorney in closing argument cited the instance of Daniel Midgol, who had changed his testimony completely. [TR. p. 942.] Defense counsel did not like this explanation and objected and asked for a mistrial, asserting that the prosecution was now trying to impeach his witness again. The motion for mistrial was denied. [TR. p. 942.]

The court refused several of the defense counsel's requested instructions, including Number 8 (Inference from Possession of Counterfeit Money), and Number 11 (Testimony of Accomplices). [CT. pp. 69, 73 and 74.] The court instructed the jury to disregard the statements and arguments of counsel and not to consider them as evidence. [TR. p. 951.] The court also instructed the jury on the weight to be given to the testimony of an accomplice. [TR. p. 961.] After the jury had retired, defense counsel took exception to the court's refusal to give his instructions but did not specify any grounds. [TR. pp. 968-969.] A verdict of guilty was entered against both appellants on Counts One and Two on Thursday, September 18. [TR. pp. 973 and 974.]

The following day, September 19, defense counsel made an oral motion for a new trial and a hearing on this motion was set for October 14 at 9:30 a.m. [TR. pp. 981 and 982.] On October 14, 1958, the defense counsel waived his motion for new trial as to Bieber, and immediately thereafter the defense counsel withdrew the motion for new trial for the appellant Myers. [TR. pp. 1000, 1001.] The appellants were each sentenced to two-year terms on the first count and five-year terms on the second, the sentences to run concurrently. [TR. pp. 1006-1010.]

IV.

STATEMENT OF FACTS.

Beginning in about January of 1958 appellant Milton Bieber was a partner with one Daniel Migdol in operating a TV repair business located at 12133 Washington Boulevard, Los Angeles, California. [TR. p. 111.] About the middle of March, 1958, financial troubles occurred and Daniel Migdol discussed with Milton Bieber the fact

that he (Daniel Midgol) could counterfeit money. [TR. p. 112.] Subsequent to this conversation, printing equipment was procured by Daniel Migdol and Milton Bieber (appellant) including a printing machine which was leased by both men jointly. [TR. pp. 217, 218.] A camera for photo-lithography was procured by Daniel Migdol and Milton Bieber, as well as a printing press. [TR. p. 115.]

On March 26, 1958, the plates were made [TR. pp. 120 and 130] and the counterfeit money was actually printed that evening by Migdol. About $78,000 worth of counterfeit money was printed in ten and twenty dollar bills. [TR. p. 120.] At the commencement of the printing of the counterfeit money appellants Bieber and Myers were both present in the front room of the TV repair shop. The money was printed in an adjoining room. [TR. p. 135.] In this adjoining room a warning system had been previously set up by Daniel Migdol. [TR. p. 132.]

A few days later Daniel Migdol asked appellant Bieber if he knew someone in the San Francisco area who he, Migdol, could do business with. [TR. p. 139.] Bieber telephoned to James Matlock in San Francisco and asked Matlock to fly down to Los Angeles to get into a deal. [TR. p. 387.] That evening appellants and Daniel Migdol met James Matlock at the Los Angeles Airport. [TR. p. 143.] At this meeting appellant Bieber explained to James Matlock that the deal involved "queer money." [TR. p. 397.] Daniel Migdol bought tickets for the entire group and they flew back to San Francisco. Daniel Midgol had taken a valise containing $60,000 and a cardboard box containing a paper cutter and $15,000 to the airport at Los Angeles. [TR. p. 142.]

When they arrived at the International Airport at San Francisco, appellant Bieber decided to return immediately to Los Angeles and he did so. [TR. p. 146.] Daniel Migdol took the valise with the $60,000 and boarded an airline terminal bus in San Francisco. [TR. p. 146.] James Matlock took the cardboard box and held it during this bus trip. [TR. pp. 148-149.]

Daniel Migdol and the appellant Myers and James Matlock rode together on this bus to the Don Hotel in San Francisco where they obtained three individual rooms on the same floor [TR. p. 149] under fictitious names. [TR. p. 403.]

James Matlock went to appellant Myers' room and, in the presence of Daniel Migdol, asked to see the money. [TR. p. 404.] He was requested to close the blinds, which he did. When he turned around Daniel Migdol handed Matlock two $20.00 bills which he took from an open brown suitcase filled with money which was lying on the bed. [TR. p. 405.] James Matlock asked to see a smaller bill and was given a $10.00 bill by Daniel Migdol. James Matlock commented on its lighter color and the appellant Myers took a bill and demonstrated how to age it by rubbing it up and straightening it on a desk or sharp surface. Appellant Myers also explained that perspiration would darken it a little bit. [TR. pp. 405, 406.] The treatment had helped darken the color but Matlock preferred the 20's and was given seven or eight more 20's by Daniel Migdol. [TR. p. 406.]

The three men left the hotel room and went to a bar. However, only James Matlock and appellant Myers entered the bar with the purpose of cashing some money. Appellant Myers paid for a drink with a $20.00 bill and commented, after the bartender had left, "Wasn't that

easy." [TR. p. 408.] They then left the bar and separated, and James Matlock went alone and passed some more bills. [TR. pp. 408, 409.]

At 8 a.m. both the attaché case and the appellant Myers were gone from the hotel [TR. pp. 152, 153]; but the sealed box with the $15,000 was in James Matlock's room. Daniel Migdol flew back to Los Angeles the next evening. [TR. p. 154.] A few days later, at the International Airport checking box, he opened a locker with a key given to him by the appellant Bieber, and took out a suitcase which contained the money previously printed and which he had last seen in the suitcase in San Francisco.

In March of 1958 Luis Del Gado met appellant Bieber in a bar [TR. p. 325] and three or four days later [TR. 327] went to Bieber's TV shop where Bieber showed him counterfeit money on printed sheets eight by ten containing about four bills of 10's and 20's. [TR. pp. 330-332.] Bieber then cut one sheet with a razor blade and gave the bills to Del Gado, [TR. p. 332.]

Since Daniel Migdol and appellant Bieber had a number of insufficient checks outstanding and had previous criminal records they feared any investigation by the District Attorney's office. [TR. p. 160.] They decided to take a trip out of the State [TR. p. 161], therefore, Daniel Migdol and the appellants Bieber and Myers, who had rejoined the group, left Los Angeles at 8 p.m., about the middle of April. [TR. pp. 160, 161.] The counterfeit money was put in a cardboard box and sealed with fibre tape by Daniel Migdol. [TR. p. 162.] The three men drove to West Memphis, Tennessee. [TR. p. 162.] During the trip, at approximately 2:30 to 3 a.m., at a point between Gallup, New Mexico, and Amarillo, Texas, on

Highway 66, Daniel Migdol disposed of the sealing plates and negatives used in counterfeiting that he had taken in the car. [TR. p. 164.] The men then arrived in West Memphis, Tennessee, and after some time returned to Missouri. [TR. p. 166.] Daniel Migdol left Bieber and Myers in a hotel in St. Louis, and he flew from the St. Louis Airport to Midway Field, Chicago. [TR. p. 170.] Here, he leased a 1957 Cadillac, drove to Chicago, and checked in at the Bismarck Hotel at 2 a.m. [TR. pp. 170-171.]

About 5:30 p.m. that evening, Migdol, pursuant to a telephone call, met Bieber and Myers at O'Hara (*sic*) Field, Illinois. He drove them back to Chicago, ate with them and then allowed them to take the car, which he had previously leased, to go sightseeing. [TR. pp. 171-172.]

During the early morning hours of April 19, 1958, appellants Bieber and Myers were involved in an automobile accident at Wilmette, Illinois, while riding in a 1957 Cadillac coupe. [TR. pp. 546 and 521.] In response to an accident call, Officer Harold Graf of the Wilmette Police Department proceeded to the scene of the accident with the police ambulance. Upon his arrival with a fellow officer, Officer Graf removed the driver of the car Bieber, from behind the wheel and placed him in an ambulance. They then took the driver to the Evanston Hospital, Evanston, Illinois. Appellant Myers was found at the scene of the accident by officers of the Evanston Police Department and also taken to the Evanston Hospital. Both appellants sustained injuries from this accident. [TR. pp. 525-528.] At the Evanston Hospital, Officer Graf assisted the doctor in removing Bieber's clothing and in a search for identification they found an argyle sock in a sport coat pocket which the appellant had

been wearing. [TR. pp. 529, 530.] The sock contained counterfeit $20.00 Federal Reserve notes [TR. p. 530] [Ex. 6] which was folded with two genuine one-dollar bills in appellant Myers' jacket. [TR. pp. 530, 531.]

Daniel Migdol was apprehended later that day and taken to the United States Secret Service office in Chicago, Illinois, on April 19, 1958, where he signed a written statement. [TR. p. 560.]

V.
SUMMARY OF ARGUMENT.

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   - B. Determination of Hostility
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ARGUMENT.

1. Prior Inconsistent Statements.

A. Appellee's Position.

The defense counsel during the course of the trial and the appellants in their brief have failed to adequately distinguish between the use of the "Los Angeles Oral Statements" and the "Chicago Written Statement." As a result they have assumed that the only use to which the "Los Angeles Oral Statements" was put, was to impeach the testimony of Daniel Migdol. This assumption is quite appearent from the statements of the defense counsel. [TR. p. 121.] The Assistant United States Attorney had asked the court for permission to propound leading questions to a hostile witness:

> "Mr. Atkins: Your Honor I am going to beg the Court's indulgence in my asking this witness leading questions. He has turned hostile. His testimony is absolutely opposite to what he has told me previously.
>
> The Court: You may go ahead and ask him leading questions." [TR. p. 120.]

Defense counsel objected, and, in furtherance of his objection, stated to the court:

> "Mr. Warner: Well, if your Honor please, counsel for the Government had indicated a protocol that he is going to follow now and I think it is highly objectionable, and the damage will have been done merely by asking the question. I think that there should be a preliminary hearing outside of the hearing of the jury to determine whether the Government is going to be allowed to impeach its own witness." [TR. p. 121.]

The Assistant United States Attorney at that point had not made any indication that he was going to impeach his own witness. It has long been established that the party calling a witness may be allowed, at the discretion of the trial court, to interrogate him by the use of leading questions, especially where the party is a hostile witness. The purpose of these leading questions is to ascertain the truth from an otherwise unwilling witness who may be trying to suppress the facts. The prosecutor referred to the "Los Angeles Oral Statements" to refresh the recollection of a hostile witness in order to induce him to tell the truth. The third paragraph of the "Chicago Written Statement" was later used by the prosecutor in an unsuccessful attempt to impeach the same witness, Daniel Migdol. It was unsuccessful because it did not contradict the previous direct testimony of the witness.

B. Determination of Hostility.

Appellants have made much to do about the fact that the court never held a hearing to determine surprise. It is common practice and good law for the trial court to rely on the assertion of counsel that he has been surprised or that the witness is hostile. In this particular instance the court was aided by the fact that the witness was a codefendant who had previously pleaded guilty, and the court was well aware of the discrepancy between the prosecuting attorney's opening statement and the witness' initial testimony.

Appellants have cited *Gendelman v. United States,* 191 F. 2d 993 (9 Cir. 1951), as authority for the proposition that a hearing should be held to determine surprise. The case does not state that; it states, at page 996, that:

> ". . . a witness may, with permission of the court, be examined as to specific prior contradictory

> statements if the trial court finds that his testimony at the trial comes as a genuine surprise to the party calling him as a witness. United States v. Maggio, 3 Cir., 1942, 126 F. 2d 155, 159, cert. denied, 316 U. S. 686, 62 S. Ct. 1275, 86 L. Ed. 1758."

United States v. Maggio, 126 F. 2d 155 (3 Cir. 1942), cited and partially read by the defense counsel at the time of trial [TR. pp. 194-197], should have clarified for the defense counsel that he was not entitled to a hearing. However, though he quoted a portion of the case to the trial judge, he did not quote the following excerpts at page 159 which state:

> "In the Federal Courts the rule was early modified so as to permit questioning for the purpose of refreshing the recollection of the witness. Hickory v. United States, 151 U. S. 303, 309, 14 S. Ct. 334, 38 L. Ed. 170."
>
> * * * * * * *
>
> "The trial court was entitled to accept the statement of the United States attorney that he was surprised by the testimony of the witness and thereupon exercise its discretion in permitting the examination as to the prior self-contradictory statements. (Citation.)"
>
> "Certainly the trial judge is not required in every such case to interrupt the trial in order to investigate whether the allegation of surprise is justified by the facts."

In *Wheeler v. United States,* 211 F. 2d 19 (D. C. C. A. 1953), cert. den. June 7, 1954, 74 S. Ct. 876, the court discussed the use of a prior inconsistent statement for

purpose of impeachment of a ten-year old girl who had been criminally attacked by the defendant. In that instance the court also had an opportunity to discuss the manner in which the trial judge might determine "surprise."

After the prosecution had called the ten-year old girl, she contradicted the earlier statement she had given to the police, and the prosecution made a claim of surprise which the court upheld and exercised its discretion thereunder to permit cross-examination and impeachment. The court stated, at page 25:

> "Maintaining that the prosecution was not 'taken by surprise,' appellant argues that, under the statute, the court was precluded from permitting cross-examination and impeachment of the child. The statute merely codifies the established rules concerning the impeachment of one's own witness and allows ample latitude for application of a broad concept of 'surprise' by requiring only that the 'court shall be satisfied' that 'surprise' exists. In terms of our review, this means that the trial court's ruling on 'surprise' may not be disturbed unless it plainly appears that the ruling is without any rational basis."

C. Refreshing Recollection of Hostile Witness.

Specifically there were three points of divergence. The prosecuting attorney in his opening statement said that the defendant Milton Bieber and the witness Daniel Migdol had agreed to counterfeit money in the middle of March; second, that there was a warning system in the front room which was used by the appellants during the course of the printing, and third, that both appellants were present while the witness Daniel Migdol printed money in a back room of a TV repair shop.

On the first point the witness Migdol admitted that the appellant Bieber and he had talked on counterfeiting money. He testified:

"Q. Now, along in March of 1958, did you conceive of an idea with Milton Bieber of printing counterfeit money?

Mr. Warner: I certainly object to a leading question like that. That is the most—

Mr. Atkins: Well, your Honor, we have to get to the point some time.

The Court: I will overrule the objection. You may answer.

The Witness: What was your question?

Q. By Mr. Atkins: Whether you arrived at a scheme with Milton Bieber for counterfeiting Federal Reserve notes. A. It was just conversation at that particular time, it was strictly—

Q. What were the circumstances? A. Well, the circumstances, we ourselves, the television plant was in pretty bad shape, and I knew of a way of making—of raising the money and I just talked the thing over to see what we could do.

Q. When was this? A. The middle of March, about the second week in March.

Q. And where did this conversation take place? A. In the television shop.

Q. About what time of day was it? A. Oh, evenings.

Q. And what was the gist of that conversation? A. Well, the gist of the conversation was that I was with the knowledge of producing it, of produc-

ing counterfeit notes satisfactorily enough so we could actually raise some cash.

Q. By the production of counterfeit bills? A. Yes." [TR. pp. 111, 112.]

On the second point, the witness initially denied that there was any warning system. Through the use of leading questions and referring to the "Los Angeles Oral Statements" and in that manner refreshing the witness' recollection, the prosecuting attorney brought out that there was, in fact, a warning system, and he also brought out the fact that the appellants were present at the time of commencement of the printing of the money.

The original denial that there was a warning system is recorded as follows:

"Q. Did you have any warning arrangements for the printing? A. No. The market, the adjoining building of our television store is a Laundromat, a 24-hour Laundromat, and our shop is known to be open until around 9:00 o'clock at night, so if a person was in there, it wasn't out of the ordinary that we are in there; I was back there, I was in a locked room, and it is in the middle of the building, and so with the hi fi going they can't—it was next door at the same time—they couldn't actually hear what was going on.

Mr. Atkins: Your Honor, I am going to beg the court's indulgence in my asking this witness leading questions. He has turned hostile. His testimony is absolutely opposite to what he has told me previously.

The Court: You may go ahead and ask him leading questions." [TR. p. 120.]

His qualification came later in the following manner:

"Mr. Atkins: I am talking about your statement to me yesterday afternoon in my office. A. All right. The statement I told you yesterday, I may have told you ten words that ought to be in fifteen pages. I was told that I was lying, that it was not the right story, to give you the right story, and I cannot give you any other story. Now, I did have a system set up there. If I did have somebody sitting out there, it was a simple system, but at the time I printed the notes there was nobody in that television shop. The people were gone. The hi fi was going, but there was nobody in the front of the shop." [TR. p. 132.]

On the third point, Migdol initially denied appellants were present at the time of the printing, as follows:

"Q. By Mr. Atkins: Had you made any arrangements for a warning system while you were printing this counterfeit money on March 26, 1958? A. At the time I made the negatives and made the plates, I was alone.

Q. I am talking about the printing of the money. A. I am talking about the printing. The money of the plates and the printing of the money was done on the night of the 26th and I was alone.

Q. Wasn't Milton Bieber around there? A. They were not present.

Q. Who was 'they'? A. Donald came down, it must have been a couple of days later with Milton, they came down to the plant. I don't think they were there. They were gone when I came back. The hi fi circuits, they were going.

Q. Was the warning system set up? A. No, sir. There was nobody to put it on. There was no reason for it." [TR. p. 130.]

By the use of leading questions and refreshing the witness' recollection and by referring to the "Los Angeles Oral Statement," the prosecuting attorney was able to have the witness qualify that statement and admit the appellants were present when he started to print the money, in the following manner.

"Q. By Mr. Atkins: In other words, you did not make that statement to me? A. I did not make it as a direct statement.

Q. Of your own free will, without you being threatened? A. It wasn't made as a direct statement. It may have been written down as far as you were concerned, but I told you that they were out there, when I entered the room in the back, they were out there with the hi fi, when I originally started printing, and when I did come out, the people were gone." [TR. p. 135.]

The word "they" on line 12 of page 135 refers back to line 6 on page 134, "With Donald Myers and Milton Bieber present in front of the television shop."

The courts have long recognized the use of leading questions in conjunction with a prior inconsistent statement to induce a reluctant witness to tell the truth as distinguished from the use of such statements to impeach the witness. This procedure was spelled out in *Hickory v. United States,* 151 U. S. 303 (1893), where the court stated at page 309:

"When a party is taken by surprise by the evidence of his witness, the latter may be interrogated

as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. As to witnesses of the other party, inconsistent statements, after the proper foundation laid by cross-examination, may be shown; *Railway Company v. Artery,* 137 U. S. 507; but proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law. Best Ev. § 645; Wharton Ev. § 549; *Melhuish v. Collier,* 15 Q. B. 878.

"By statute in England and in many of the States, it has been provided that a party may, in case the witness shall in the opinion of the judge prove adverse, by leave of the judge, show that he has made at other times statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actual hostile testimony with which the party has been surprised. *Adams v. Wheeler,* 97 Mass. 67; *Greenough v. Eccles,* 5 C.B. (N.S.) 786; *Rice v. Howard,* 16 Q.B.D. 681."

The appellants have relied on *Block v. United States,* 88 F. 2d 618 (2 Cir. 1937), where Judge Learned Hand criticized the prosecutor who continually referred to a written statement made by the witness and which the witness consistently denied. However, the court impliedly ap-

proved the general procedure followed by the prosecutor in that case if it is kept within proper bounds.

". . . One of the prosecution's witnesses was Daniel Block, a brother of the defendant, Max Block. Before the trial he had been subpoenaed to appear before the grand jury or the prosecutor, to whom he made a statement which was taken down by a stenographer and typed. This incriminated both Max Block and Levy; the witness said in substance that together with Griffin they were the leaders in the enterprise, and had often discussed the still and the general business in his hearing, especially at Block's house where they lived. When called at the trial this witness proved recalcitrant and would not stand by his story. The prosecutor for a while unsuccessfully plied him in the usual way; he would remember nothing of any consequence and what he did was vague and unconvincing; it was plain to anyone who had the ex parte examination before him, that he had had a change of heart and meant to protect his brother. The prosecutor thereupon turned the examination into a cross-examination; and this the judge allowed —quite properly, for it was obvious that the witness was suppressing the truth. That also proved unsuccessful; and the prosecutor began to use the earlier statement. First, he asked the witness to read it, and see whether it did not refresh his recollection. It did not. Finding himself thus baffled, the prosecutor then began to read the examination, question and answer, asking him after he had read a passage, whether it was true. The witness, so cornered, tried to excuse himself by saying that he had been frightened; that he had answered what he thought would

best please; and that all the incriminating answers were fabrications of the moment. This was continued until the whole of the statement had been read to the jury, though all that was of any moment he explicitly disclaimed. All this time the defendants continually protested and were uniformly overruled. Upon his charge the judge told the jury that they might use any part of the statement which the witness had admitted; but none that he had not.

"The position of a prosecutor, faced with a prejured witness whom he had called with good warrant to support him friendly, is trying, and the courts have not dealt hardly with him. In Di Carlo v. United States, 6 F. 2d 364, we said that he should be given the greatest latitude in examination and allowed to use the earlier statement, even at the risk that the jury might take it as testimony; indeed, we went so far as to say that it was possible that it might in fact become testimony; for a witness upon the stand may so behave that his conduct is more of an affirmation of an earlier statement than his halting words are a denial; . . ."

The *Block* case was reversed because the witness consistently denied the truth of all his prior statements, which distinguished *Block* from the case at hand where affirmative testimony was adduced through cross-examination, as we have shown earlier in this argument.

The manner of examination and the latitude to be allowed rests in the sound discretion of the trial judge which is the basic test of propriety. *Poliafico v. United States,* 237 F. 2d 97 (6 Cir. 1956), at page 108 states:

"Appellants claim that it was error on the part of the court to permit the government attorney to

cross examine two government witnesses on their contradictory grand jury testimony, after they had turned hostile, and the government had been taken by surprise. The prior testimony, which was read to the witnesses, was for the purpose of refreshing their memory, and did, in fact, refresh their memory in a number of instances. The trial court clearly and thoroughly explained to the jury that such cross examination was permitted only to refresh the witnesses' recollection, and that the questions and answers read to them were not evidence to be considered by the jury in the case.

" 'When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness.' Hickory v. United States, 151 U. S. 303, 309, 14 S. Ct. 334, 336, 38 L. Ed. 170.

"In Di Carlo v. United States, 2 Cir., 6 F. 2d 364, 368, the court said:

" 'This latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other

times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times. . . . The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.'

"In United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 233, 60 S. Ct. 811, 849, 84 L. Ed. 1129, the Supreme Court said, in a similar case:

" 'As in case of leading questions, * * * such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See Di Carlo v. United States, [2 Cir.] 6 F. 2d 364, 367-368; Bosselman v. United States, [2 Cir.] 239 F. 82, 85; Felder v. United States, [2 Cir.] 9 F. 2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection.' "

Similar language is also found in the case of *Feutralle, et al. v. United States* (5 Cir. 1954), 209 F. 2d 159, at page 162:

> "Considerable discretion is allowed the trial court in the manner in which the examination of witnesses shall be conducted. That court, by its presence, can gauge the circumstances much better than they can be presented by a cold record. The court could well conclude that the witnesses had become hostile and sought to evade. The recital of the prior statements afforded ample grounds for government counsel's pleas of surprise in each instance. Even then, however, counsel did not precisely seek to impeach the witness, but rather sought to use the statements as a means of refreshing the recollection of the witness and then, by leading questions, comprising as to Rowe the entire recital of the statement and as to Kelly by the separate contents of the statement, to secure the correction of the previously evasive, and in some respects conflicting, responses in the testimony of the witnesses upon the trial. When the testimony was completed, in each instance the truth of the matter was admitted to be as contained in the statement. Neither of the statements included any hearsay recitations. The recitals of each related only to matters which were admissible against the defendants upon the present trial. We do not have here, therefore, a case where the consistent and final denial by the witness of the recitals of the statement render such recitals mere hearsay, entirely inadmissible as substantive evidence, and proper for consideration only for impeachment purpose and which, even for this purpose should be admitted to no extent further

than is necessary to undo the harm caused by unexpected testimony. Such improper use of written statements we have uniformly condemned."

D. Attempted Impeachment.

Later in the interrogation of the witness Daniel Migdol, the prosecutor expressly stated that he was attempting to impeach Migdol by use of a prior statement, the "Chicago Written Statement." [TR. p. 178.]

The witness was allowed to read the entire "Chicago Written Statement" to himself. The defense counsel was allowed to examine it and attention was particularly directed to paragraph three which deals primarily with an agreement between defendant Bieber and the witness Daniel Migdol. Immediately after the witness had read paragraph three to the jury (the jury was never allowed to see the statement and no other portion was referred to throughout the trial), the court stated:

"The Court: Why don't you make a motion to strike it out? I told you a few minutes ago I am trying to help you.

Mr. Warner: Yes, sir.

The Court: Yes.

Mr. Warner: Well . . .

Mr. Atkins: I would like to have the witness read that last sentence once with all the words in it.

The Court: The court on its own motion will strike out from your minds what he has just read, on the grounds that it is not impeaching, because he has already told you about that this morning.

The Witness: The last four lines or one sentence? Not the last line . . .

The Court: Isn't that in substance, Mr. Migdol, what you told the jury a little while ago? A. Yes, sir, exactly. There isn't a thing in here—the only thing that is here, they got a name of 'Milton' put in there, it says 'Milton and I decided.' Milton and I did not decide. They got the name Milton in here. That is what I was trying to get at.

The Court: I do not feel that that particular part is impeaching, because he has already told the jury that in substance already this morning.

Mr. Atkins: He denied vehemently that they had had an agreement, your Honor.

The Witness: Well, this does not mean that we had an agreement.

Mr. Atkins: And that statement has in it that 'Milton and I decided' that. That is an impeaching statement.

The Court: He explained that a little while ago. He explained that." [TR. pp. 188, 189.]

The prosecutor was attempting to impeach the statement of the witness that there was no agreement between the appellant Bieber and himself. In the "Chicago Written Statement" the witness had previously stated, "Milton and I decided." The witness was now denying this. If this was an inconsistency, then the prosecutor had the right to impeach the witness who had given affirmative evidence of a *lack* of an agreement.

Hickory v. United States, supra;
Poliafico v. United States, supra;
Wheeler v. United States, supra.

The court expressed its opinion that the statements were not inconsistent and after the matter had been put

before the jury he instructed them, in effect, to disregard the "Chicago Written Statement."

The defense counsel, after he had examined the paragraph three of the "Chicago Written Statement," had also insisted that there was no contradiction, as follows:

> "Mr. Warner: There is nothing in that particular paragraph pointed out by Mr. Atkins which either contradicts the testimony of this witness or . . ." [TR. p. 183.]

Since the court ruled exactly in accordance with the position taken by the defense counsel, it is inconceivable that any prejudice resulted from this. If the court's ruling was incorrect in that there was some inconsistency, then certainly the prosecutor was within proper bounds, where he was surprised by a now hostile witness, in attempting to impeach such witness with a previous inconsistent statement on a material point.

2. Jury Instructions.

A. Non-Compliance With Rule 30.

Appellants failed to comply with Rule 30 of the Federal Rules of Criminal Procedure with regard to the granting or denying of the request for instructions in two particulars. First, defense counsel did not take exception to the instructions that were granted nor to those that were refused until after the jury had retired to the jury room to deliberate. The following appears in the record:

> "(Whereupon, at the hour of 11:11 A.M. the jury retired to the jury room to deliberate upon its verdicts.)
>
> (The following proceedings were had before the court, without the presence of the jury:)

Mr. Warner: Just for the record, may I take an exception?

The Court: All right, take an exception. Go ahead.

Mr. Warner: We have your blessing, then.

The Court: Go ahead. Go ahead.

Mr. Warner: O. K. In behalf of the defendants Bieber and Myers I take exception to the instructions numbered Government's 3, 6, 7 and 16, and take exception to the Court's refusal to give instructions 1 to 13 inclusive, of the defendants' proposed jury instructions.

The Court: All right. Did you state all exceptions?

Mr. Warner: Yes, sir, I did." [TR. pp. 968, 969.]

From the above quotation it is also apparent that defense counsel did not state the grounds of his belated objection. Appellants cannot for the first time on appeal object to the instructions given to the jury by the trial court. Rule 30 of the Federal Rules of Criminal Procedure is not satisfied by an objection in a general manner. If the trial judge is not given an opportunity to rule on the specific objection, the error complained of need not be considered on appeal. (*United States v. Bender,* 218 F. 2d 869 (7th Cir. 1955).)

This court has passed upon the failure of parties to raise their objection to the instructions prior to the jury retiring. In the case of *Brown v. United States,* (9th Cir. 1955), 222 F. 2d 293 at 298, this court stated:

> "Appellant objects to one of the jury instructions given by the court. It is not necessary to discuss the merit of the disputed instruction inasmuch as no

objection to it was made by appellant prior to the time the jury retired.

"Rule 30 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., provides in material part:

"'* * * no party may assign as error any portion of the charge or admission therefrom unless he objects thereto . . . before the jury retires to consider its verdict * * *.'

"And this court recently stated in *Enriquez v. United States,* 9th Cir. 1951, 188 F. 2d 313, 316:

"'We may say that Rule 30 is not designed as a mere trap for the unwary. Painstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of criminal justice.'"

In 1955 in *Herzog v. United States,* 226 F. 2d 561, (9th Cir. 1955) a division of this court considered the relationship of Rule 30, Federal Rules of Criminal Procedure, and Rule 52, Federal Rules of Criminal Procedure. The court was attempting to clarify the apparent inconsistency between *Bloch v. United States,* 221 F. 2d 786 (9th Cir. 1955), rehearing denied 223 F. 2d 297 (9th Cir.), and the case of *Brown v. United States, supra,* which was decided three days after the *Bloch* case and in the opinion of the court had overruled *sub silentio* the *Bloch* case. The court found that Rule 30 and Rule 52 did not nullify each other and stated at page 569:

"Rule 30 is clear and unambiguous and its application is not dependent upon the personal whims of the court. It provides that no portion of the charge

to the jury or omission therefrom may be assigned as error unless objection is made before the jury retires. This rule which has the force of law leaves no area in which it may be disregarded."

In explaining the purpose of Rule 52 the court stated at page 570:

> "The manifest intent of the rule [52] is to permit courts *sua sponte* to notice error which the parties through neglect or inadvertence failed to call to the court's attention, but *it does not authorize the consideration of matters which another rule specifically states shall not be assigned as error.*"

This court *en banc* granted a rehearing in the *Herzog* case, *Herzog v. United States,* 235 F. 2d 664 (9th Cir. 1956), cert. den. 77 S. Ct. 54. The rehearing was limited to the one issue as to whether the power of the court under Rule 52 (b) of the Rules of Criminal Procedure, 18 U. S. C. A., is limited or circumscribed by the provision of Rule 30. This court then made a distinction that Rule 30 referred to the action of a party, whereas Rule 52 (b) referred to a grant of authority to the court, in the following language at pages 666 and 667:

> "Criminal Rule 30 by its terms precludes *a party* from assigning as error the giving of an instruction to which he has not objected on the trial. Rule 52 (b), appearing under the caption 'General Provisions,' is not directed to the party, but is a grant of authority to the court itself. These rules are not conflicting. Rather, they complement each other. Rule 52 (b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the in-

tegrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The rule is in the nature of an anchor to windward. It is a species of safety provision a precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

* * * * * * * *

"This court has not gone overboard in its application of Rule 52 (b) to situations such as here presented, and it does not propose to do so now. In the great bulk of the cases in which counsel have sought to have us consider claims of error in instructions not objected at the trial we have declined to do so. More than once we have stressed the salutory nature of the Rule 30 and the vitally important part it plays in the administration of justice . . . But, in common with the generality of the circuits, we recognize that the Rule does not debar us from noticing of our own motion error in instructions thought to have resulted in a miscarriage of justice.

* * * * * * * *

"In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record. Such is the course followed even in the normal criminal case, where the accused has preserved his right of review by timely and appropriate objection on the trial."

Procedurally, therefore, the appellants have not properly raised their objections to jury instructions. The Govern-

ment's proposed Supplemental "A" Instruction was never adopted by defense counsel at the trial and the court's refusal to give it is first raised in appellant's brief. Specifications of error 3 and 4 (Appellant's Brief page 22) deal with the refusal of the trial court to grant appellants' proposed instructions 11 and 8, respectively. The objection to the failure to give these instructions came immediately after the jury had retired and defense counsel failed to state the ground of his exception or point out any error that was prejudicial to the defendant. Consequently, he has failed to comply with Rule 30 and if the specifications of errors are to be considered by the court at all it can only be under Rule 52 (b).

For the reasons stated hereinafter it is the position of the Government that there was no prejudicial error in failure to grant these instructions and accordingly the specifications of error should be disregarded.

B. Government's Proposed Supplemental "A" Instruction.

There was no error in the court's refusal to give Government's proposed Supplemental "A" Instruction which refers to the "Chicago Written Statement" [CT. p. 70]. At the time this instruction was offered and refused by the court, the defense counsel made no objection to the court's ruling [TR. pp. 948, 949].

On the basis of what transpired during the course of the trial, it is quite apparent that the court's refusal to give the Government's proposed Supplemental "A" Instruction was quite proper. The "Chicago Written Statement" was never before the jury. It had been introduced into evidence at a hearing out of the presence of the jury, was not referred to when the jury returned, and then at side bar, when the Government rested, was with-

drawn from evidence [TR. pp. 565, 579, 580]. The only portion of the "Chicago Written Statement" which the jury was aware of was paragraph three which the witness read at the trial judge's instruction [TR. p. 185]. It is interesting to note that neither the court nor the defense counsel nor the witness himself considered this paragraph to be contradictory to his previous testimony and for that reason the court on its own motion had the paragraph which was read stricken as evidence.

Paragraph "three" which the witness read [TR. pp. 186, 187] appeared to be the same as the witness' previous testimony which was material and relevant and not objectionable on the grounds that it contained hearsay. Accordingly, the court's refusal to grant the instruction was quite proper and consistent with the previous court ruling in respect to which both the witness and the defense counsel had agreed that the statement was not impeaching.

C. Appellant's Proposed Instruction 11.

What appellants have raised in their third specification of error is precisely the point that this court decided against their contention in the case of *Cowell v. United States* (9th Cir. 1958), 259 F. 2d 660 and the issue before the court in that case was whether or not the "better rule" referred to in the case of *Holmgren v. United States* (1910), 217 U. S. 509 at 523 and 524, must be given in instructions on the corroborative circumstances that must surround the testimony of an accomplice. In appellant's brief at page 40, this comment appears referring to the *Cowell* case and also *Mims v United States* (9th Cir. 1958), 254 F. 2d 654:

> "In each, this court paid lip service to the 'better practice' outlined in the Holmgren case (corroborat-

ing evidence for the testimony of an accomplice) but then found reasons for concluding that, in the circumstances presented, each of the juries had been adequately instructed."

This is not a fair statement of what the court stated in Cowell. In Cowell the court merely delineated the issue which it was facing and the court concluded that it is not necessary to follow what was the so-called "better rule" of the *Holmgren* case. The Supreme Court case of *Caminetti v. United States* (1917), 242 U. S. 470, at 495, similarly held that it was not reversible error to refuse to caution the jury as to the weight to be given to the testimony of an accomplice. Hence, the ruling of the District Court was proper.

D. Appellants' Proposed Instruction 8.

In their fourth specification the appellants object to the refusal to grant appellants' proposed instruction No. 8 which accurately states the law and is supported by the cases which appellants have cited. In neither of the cases that were cited however was the issue a refusal of the court to grant an instruction as to the inference to be drawn from mere possession of counterfeit money. In both cases the issue was suffiency of the evidence and the crime charged was the passing knowingly and wilfully of counterfeit money. (*Marson v. United States* (6th Cir. 1953), 203 F. 2d 904 also contained a conspiracy charge.) In the instant case appellants were charged in count 2 with manufacturing and counterfeiting.

The only question at this point is did the court adequately instruct on the two charges on which the appellants were tried—to wit; Count One and Count Two.

Although appellants have stated in their brief that they are limiting this appeal to Count Two (Appellant's Brief, page 3) it is submitted that a review of the court's instructions both as to Count One and Count Two clearly indicate that the court adequately covered the essential elements of the crimes. The instructions given in regard to Count One are set forth in the Clerk's Transcript pages 49-53; 55-57 [TR. pp. 953-958]. The instructions given in regard to Count Two are set forth in Clerk's Transcript at page 60 [TR. pp. 962, 963].

3. Remark of Trial Judge.

To bolster their position with regard to appellants' proposed instruction No. 11, appellants on page 41 of their brief attempt to bring before this Court an allegation of misconduct on the part of the trial judge because of a remark made, recorded at page 894 of the transcript of record.

> "Mr. Warner: . . . Now, in view of the limited time, I am not going into a further delineation of Matlock. I think I could mention several other things which would indicate that he occupied the position of Mr. A in this little story about A and B and that he comes within this group, who is either amenable to suggestion, has guile and cunning or a combination of both so that he could get off the hook himself. Remember, he had pleaded guilty to this charge a long time ago. He hasn't been sentenced yet, five months later he hasn't been sentenced yet. Do you see a reason for his testimony? Five months. There is something unusual about that. What better way could he get off the hook? What better way than by having Myers on the string?

The Court: Well, I will tell you right now, he is not going to get off the hook. I am going to sentence him.

Mr. Warner: He is going to be sentenced?

The Court: They have pleaded guilty and they will be sentenced, and they are not going to get off the hook, either one of them. I thought you would like to know.

Mr. Warner: Now, we have the testimony of Del Gado."

The position of appellee on this point is twofold. First appellants have failed to follow the proper procedure in raising this point. Second, the judge's comment was quite proper under the circumstances.

In *United States v. Wernecke* (7th Cir. 1943), 138 F. 2d 561, the Court ruled on the comment of the trial judge to the jury which defense counsel raised for the first time on appeal. The remark of the trial judge came as he was excusing the jury. The Court had this to say at page 564:

> "Furthermore, the defendant made no objection to the Court's statement at the time it was made and took no steps to correct any supposedly prejudicial conduct so as to give the Court a chance to correct any mistake it might have made. The objection cannot be taken here for the first time."

The obvious purpose for this rule is to provide for the orderly administration of justice and to allow the trial judge, if he has inadvertently or mistakenly made an improper remark to the jury, to correct the error at that point rather than to have a continuation of a case by ap-

peal and retrial resulting in an undue extension of time and effort which might have been very simply avoided.

In this instance, the defense counsel made no objection to the Court's remark at the time of trial. It is now raised here as a collateral matter, supposedly to bolster appellants' position with regard to the failure to grant appellants' proposed instruction No. 11 [CT. p. 74].

It is not germane to that instruction; either the one the Court granted was correct or it was not correct. The alleged misconduct of the trial judge in a comment to the jury certainly has no direct relationship to that instruction. It is an attempt to bring before this Court something that should have properly been objected to at the time of trial; if in fact there was a valid objection.

The trial judge is the person charged with the responsibility of protecting the dignity and decorum of the court and he alone is in the best position to judge when prosecuting attorneys or defense counsel are overstepping their bounds. It is submitted that a glance at the portion of the transcript quoted *supra* on this particular point indicates that the defense counsel invited the comment of the Court when he stated that this particular witness had not been sentenced for five months and that there was something unusual about it and what better way could he get off the hook. The only fair conclusion to that and to the rejoinder of the Court is that defense counsel had gone too far and had invited the rejoinder of the Court which, under the circumstances, certainly was not prejudicial to anyone and was only designed to correct any possible misinterpretation by the jury and also to prevent an affront to the Court.

4. Sufficiency of the Evidence.

Appellants have quoted at length from their own testimony (Appellants' Brief, pages 18, 19 and 20) as though the jury was bound by their testimony and ought to disbelieve that of the Government witnesses. Although appellants have not specified as an error, sufficiency of the evidence, it is quite apparent from the phraseology of appellants' brief they are indirectly doing so. The phraseology referred to is as follows:

> ". . . the tenuousness of the case supported by the available direct testimony against appellants, . . . with the result that little if any of the evidence considered by the jury was approached by it with a proper mental set.
>
> ". . . while a defendant may be convicted solely on the unsupported direct testimony of a co-conspirator, it is impossible to determine in this case whether such was the result since there was also before the jury throughout a substantial portion of the trial hearsay of a far more imposing and detailed nature . . .
>
> "In view of the limited probative value of the direct testimony against appellants, . . .
>
> "Excepting for government witness Migdol's hearsay statement, there was only the weakest of evidence against either of the appellants. . . . Other than these two quanta of more or less suspect testimony, there is absolutely no direct evidence . . . The testimony of Leland Griffith, . . . regarding the finding of aluminum plates . . . was totally unilluminating . . .
>
> "In view of the paucity of incriminating direct testimony, it is submitted . . ." (Appellants Brief, pages 23, 24 and 25.)

Reference is made to appellee's statement of facts for clarification of the evidence presented. Suffice to say that this Court is not concerned with weighing the evidence or passing on the credibility of witnesses. The convictions should be sustained if there was substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser (1942), 315 U. S. 60, 80;
Arena v. United States (9th Cir. 1955), 226 F. 2d 227, 229, cert. denied 350 U. S. 954 (1956).

Conclusions.

The Court properly granted the prosecuting attorney permission to ask leading questions of a hostile witness.

The prosecuting attorney properly made use of prior inconsistent oral statements for the purpose of refreshing the recollection of the hostile witness and inducing him to tell the truth.

The Court did not err in refusing the instructions indicated in appellants' specifications of error.

The evidence was sufficient to sustain the conviction.

Respectfully submitted,

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